

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1689 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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PRABHABEN NATVERLAL DAVE

Versus

KILLOLKUMAR MANDIR

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Appearance:

MR SK JHAVERI for Petitioner

MR RN SHAH for Respondent No. 1

MR NIGAM SHUKLA for Respondent No. 2

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CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 03/08/96

#### ORAL JUDGMENT

Heard learned counsel for the parties. The petitioner was appointed as Assistant Teacher in the respondent No.1-school on 1st October 1972. Under the letter dated 22nd March 1980, the principal of the school informed the petitioner that the Kumar Mandir is to be closed from 31st May 1980 and as such, her services will be terminated on 31st May 1980. The school was not

closed and it continued and the services of the petitioner were not terminated on 31st May 1980. The petitioner received a letter dated 3rd June 1980, under which she has been informed that her services are no more required by the school. Though initially, a copy of this letter was not submitted by the petitioner in this proceedings, but now it has been submitted alongwith additional affidavit. The petitioner felt aggrieved of the termination of her services raised a dispute. This dispute was referred by the Government to the Labour Court, Rajkot where it was registered as Ref. (LCR) No.718/80. The Labour Court, Rajkot, under its award dated 19th December 1981 dismissed the reference only on the ground that the petitioner, a teacher is not a workman within the definition as given u/s.2(s) of the Industrial Disputes Act, 1947. The Labour Court has not gone on the merits of the matter. This award has been challenged by the petitioner by filing this Special Civil Application.

2. In view of the decision of the Hon'ble Supreme Court in the case of Sundarmal v. Government of Goa, Daman & Diu, reported in 1988 SCC (LNS) 482, the award is perfectly legal and justified, but the contention of the learned counsel for the petitioner is that the petitioner cannot be rendered remediless. This Court now in view of the fact that the petitioner is not a workman, should decide the matter on merits. On the other hand, the learned counsel for the respondent-school contended that the writ petition has been filed by the petitioner against the award and that is the only controversy before this Court and as such, this Court should not go on the merits of the case. In case the petitioner has some grievance, then she may approach for appropriate remedy before the Tribunal constituted for the primary school teachers. On merits, the learned counsel for the petitioner contended that the order of termination of petitioner is void ab-initio. If it is taken to be a case of termination of service of petitioner by penalty then, no inquiry has been held. If it is taken to be a case of a simpliciter termination, then too, it is invalid as no reasons whatsoever were given by the respondent nor any show cause notice and an opportunity of hearing was given to the petitioner. The service of the petitioner is sought to be terminated after she served the school for about eight years. The termination of service of the petitioner, particularly, when she has served the school for such a long period, could not have been terminated in such a cursory manner. The order of termination of the service of the petitioner is therefore, what the learned counsel for the petitioner

contended, is arbitrary and violates Article 14 of the Constitution of India. It has next been contended that the services of the petitioner are terminated without approval of the District Education Officer and as such it is void ab-initio. On the other hand, the learned counsel for the respondent contended that it was a case of termination simpliciter and as such, no notice or opportunity of hearing was required to be given to the petitioner. The learned counsel for the respondent further contended that the provision which requires approval of the District Education Officer for termination of service was stayed by this Court in the case of Ahmedabad Kelavani Trust v. State of Gujarat & Ors., reported in 19(1) GLR 671, and as such, it was not necessary for the petitioner to comply with the said provision. I have given my thoughtful consideration to the contentions made by the learned counsel for the parties.

3. In the case of Sundarmal v. Govt. of Goa, Daman & Diu (Supra), the Hon'ble Supreme Court has held that the teachers working in such educational institutions not covered by the definition of workmen as given u/s.2(s) of the Industrial Disputes Act, 1947, though educational institution will certainly fall within the definition of Section 2(j) of the Industrial Disputes Act, 1947. The dispute regarding termination of services of the teachers as such, in view of the aforesaid decision of the Supreme Court could not have been referred and in case it is referred to the Labour Court, it could not have decided the same on merits. The teachers employed by the educational institution and in the category of primary, secondary, graduate or post graduate education cannot be called as a workmen within the meaning of Section 2(s) of the Industrial Disputes Act, 1947. Imparting education is the main function of teachers in a teaching institution and the same cannot be considered as skilled or unskilled manual work or supervisory work or technical work or clerical work. Imparting education is in the nature of mission or a noble vocation. Even if some teacher is doing some clerical work in the institution, it is only incidental to the principal work of teaching. The Labour Court, in view of this settled position of law, has rightly dismissed the reference.

4. The next question raised for consideration of this Court is whether the petitioner should relegate to the remedy of appeal or this Court should decide the matter on merits. The learned counsel for the petitioner does not dispute that in view of the fact that reference has been dismissed, the petitioner could have approached

to the Appellate forum, but prior to 1988, the legal position regarding the status of the petitioner being a workman or not was not settled and as such at that point of time that remedy has not been availed of. He further contended that this writ petition is pending before this Court for last 14 years after admission and as such, instead of relegating the petitioner to the remedy of appeal, this Court may itself decide this matter on merits. Taking this contention further, the learned counsel for the petitioner urged that the termination of service of petitioner is ex-facie illegal and as such, otherwise also relegating the petitioner to the remedy of appeal may not be just and reasonable. I have given my thoughtful consideration to this submission.

5. It is true that where the petitioner has a alternative remedy available against the impugned order in this Special Civil Application, the petitioner, normally should have been first asked to avail of alternative remedy available. In the present case, the petitioner has an alternative remedy under the statute. Where statutory remedy has been provided, insistence of the Court should be there to the litigants to first avail of that remedy. In such case, this Court, normally should ask the litigant first to avail of the alternative remedy available, but that could have been done when the matter came up for admission. After admission of the petition and keeping it pending for all these years, in this case, 14 years, normally this Court should not relegate the petitioner to the alternative remedy available. It is a case where the matter should be decided on merits. Though this principle may not be acceptable in each and every case, but in the present case, I do not consider it to be appropriate at this stage to relegate the petitioner to alternative remedy available. The termination of service of petitioner has been made 16 years back and in case she is asked to avail the alternative remedy of appeal now, that may take some more time. There is yet another reason for deciding the matter on merits. On facts there is no dispute and no inquiry thereof has to be undergone or ordered by this Court. Before proceeding with this case on merits, I consider it to be appropriate to deal with another objection raised by learned counsel for the respondents. The learned counsel for the petitioner does not dispute that the validity of Schedule 'F' attached to the Bombay Primary Education Rules 1949 has been challenged before this Court. In the petitions which have been decided by this Court, decision of which is reported in 19(1) GLR 671, stay has also been granted. The learned counsel for the petitioner contended that the respondent No.1 has not

challenged the validity of Schedule 'F' at any stage. Whatever stay order has been given by this Court may be taken to be only for those institutions who filed Special Civil Applications challenging the validity of Schedule 'F'. It has next been contended by the learned counsel for the petitioner that these Special Civil Applications have already been dismissed and Schedule 'F' was held to be valid by this Court. So, the stay order which has been granted by this Court has come to an end. Schedule 'F' has been held to be valid and as such, the respondents could not have taken any shelter of the fact that that provision has been stayed. Substance of the matter is that ultimately this Court held that provision to be valid and termination orders which have been in contemplation thereof have to be set aside. I have given my thoughtful consideration to the submissions made by learned counsel for the petitioner on this point. I find sufficient merits in the contentions of the learned counsel for the petitioner. The respondent has admittedly not challenged the validity of Schedule 'F'. I do not consider it appropriate to go on the question whether the stay given in the cases of other persons benefit thereof can be taken by the petitioner or not? But the fact remains that ultimately the provision as contained in Schedule 'F' attached to the Bombay Primary Education Rules, 1949 has been held to be valid by this Court. It was a valid provision and non compliance thereof will render the order of termination to be invalid. Merely on the aforesaid ground, the petitioner cannot be ousted and an illegal termination order of the petitioner cannot be allowed to stand. In case the contention of respondent is accepted, then this Court will, despite of the fact that the provision as contained in Schedule 'F' has been held to be valid and the order of termination was made in violation thereof, maintain the illegal order which will perpetuate an illegality. This Court, sitting under Article 226 of the Constitution of India will not allow to perpetuate any illegality. Thus, the second objection raised by the learned counsel for the respondent is devoid of any substance.

6. The petitioner was admittedly appointed as Assistant Teacher on 1st October 1972. At one point of time, the service of the petitioner were sought to be terminated on the ground that the school is to be closed. But the termination of service of petitioner, on that count, has not been made. Thereafter, on 3.6.80, the services of the petitioner have been terminated and the petitioner has produced a copy of the said letter 3.6.80 as annexure 'C' alongwith the affidavit filed by her. I do not find therein any reason given to terminate the

service of the petitioner. The petitioner was working in the school for last 8 years preceding the date of termination and as such, the termination of services could have been done on some cogent and justified grounds, which is altogether missing in the present case. I find sufficient merits in the contention of the learned counsel for the petitioner that in such cases, the employee should be given an opportunity of hearing, which has also not been done in the present case. The respondent has not come up with the case that the termination of service of petitioner is made for misconduct by way of penalty and as such on other contentions, I do not consider it to go on.

7. Clause 3 of Schedule 'F' attached to the Bombay Primary Education Rules 1949 provides that the management of a private school shall not terminate, otherwise than as a major penalty, the services of any permanent trained teacher without previous permission of the administrative officer. In this case, reply to writ petition has not been filed, but the learned counsel for the respondent contended that the petitioner was not a permanent trained teacher and as such, the provisions as contained in the aforesaid clause 3 of Schedule 'F' to the Rules 1949, is not attracted. The learned counsel for the petitioner, on the other hand, contended that this contention raised by the learned counsel for respondent No.1 is devoid of any substance. This contention made by learned counsel for respondent No.1 is without any reference to the provisions as contained in clause 3 of Schedule 'F' of attached to the said Rules 1949. Clause 3 of Schedule 'F' provides that an employee appointed for a definite period in a post which is not vacant, shall be a temporary employee. A proviso to clause 3 of Schedule 'F' is there which provides that a temporary employee on completion of two years' service shall be treated as permanent employee. In view of this proviso, even if it is taken to be a case, though there is no material on record, that the petitioner was appointed as a temporary employee, the date on which his services were brought to an end, has completed more than two years' service. By legal fiction as created under the aforesaid proviso, the petitioner acquired status of permanent employee on completion of two years' service. So far as the other contention of the learned counsel for the respondent No.1, that the petitioner was not a trained teacher, is concerned, a reference may have to clause 7 of Schedule 'F' of said Rules 1949. Clause 7 provides that the teachers who are below the age of 35 years on the date of commencement of these Rules, shall be required to get training within a period of five years

from such date. Replying to this contention, the learned counsel for the petitioner contended that the petitioner, the date on which his services were terminated, was more than 35 years' old and as such, she was exempted from undergoing training. On the date of termination of the services of the petitioner, she was above 35 years and therefore she could not have been considered to be untrained teacher. For all the purposes, she could have been considered a trained teacher, and as such it is case where clause 3 is clearly attracted to the present case and the termination of service of petitioner has been made by the respondent without previous permission of administrative officer, and the said act of respondent is void ab-initio. I have given my thoughtful consideration to this contention of the learned counsel for the petitioner. Clause 7 of the said Schedule clinches the issue. Even if we proceed with assumption that the petitioner was not a trained teacher, as she was not below 35 years on the date of termination of services, she will be deemed to be a trained teacher. Both requirements of clause 3 are there in the present case and the termination of service of petitioner is admittedly made without previous permission of the administrative officer and the same cannot be allowed to stand.

8. In the result, this Special Civil Application succeeds and the same is allowed. The order of termination of service of the petitioner is declared to be void ab-initio. The respondent No.1 is directed to reinstate the petitioner forthwith in the service. The petitioner shall be entitled to all the back wages with yearly increments and with all the benefits of revision of pay scale, if any made, during this interval. It is a case where the petitioner has been unnecessarily dragged into litigation. The petitioner was a low paid employee and against the illegal action of the respondent, she has to first go to the Labour Court and then he has approached this Court, for no fault of her own and therefore it is a case where the petitioner should be compensated for the expenses which she incurred for litigation against the respondents. The respondent No.1 is directed to pay Rs.2,000/- by way of costs of this Special Civil Application to the petitioner. The petitioner has been deprived for all these years, not only of employment, but the salary also. Taking into consideration this fact, the respondent No.1 is further directed to pay to the petitioner interest on the arrears of salary at the rate of 12% p.a., from the date of decision till the payment thereof. Rule is made absolute in the aforesaid terms.

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